Nos. 88-1247 and 88-1248

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent, The National Farmers' Organization, Inc. (NFO),[1] respectfully opposes the Petitions for Writ of Certiorari filed by Associated Milk Producers, Inc.

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[1] NFO has no parent or subsidiaries and has the following affiliates: NFO Members' CD&D Corporation; NFO Members' Meat Custodial Account, an Iowa Trust; NFO Members' Dairy Custodial Account, an Iowa Trust; NFO Members' Grain Custodial Account, an Iowa Trust.

(AMPI) and Mid-America Dairymen, Inc. (Mid-Am), and Central Milk Producers Cooperative (CMPC), to review the decision of the United States Court of Appeals for the Eighth Circuit finding that NFO has incurred substantial damages as a result of Petitioners' unlawful acts and remanding the case to the district court for further computation of damages and an award of appropriate attorneys' fees and costs.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*) (3a).[2] The district court opinion is reported at *Alexander v. National Farmers' Organization*, 614 F. Supp. 745 (W.D. Mo. 1985) (*"NFO III"*) (65a). The prior Court of Appeals opinion finding that Petitioners had illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk is reported at *Alexander v. National Farmers' Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 938, 939 (1983) (*"NFO II"*) (231a). The initial district court opinion is reported at *In re Midwest Milk Monopolization Litigation*, 510 F. Supp. 381 (W.D. Mo. 1981) (*"NFO I"*) (297a).

STATEMENT OF THE CASE

This case and virtually all of the issues urged by Petitioners are before this court for the second time. Nearly eighteen years after the beginning of this case, it is now conclusively established that Petitioners, sellers of raw milk, engaged in a widespread antitrust conspiracy to eliminate competitive milk sellers, including NFO, and that Petitioners' conspiratorial conduct injured NFO. *NFO II*, 687 F.2d 1173 (231a); *NFO IV*, 850 F.2d

[2] Parallel citations to the printed Appendix will be in parentheses, e.g. "(3a)".

1286, 1312 (57a). In 1983 Petitioners sought certiorari to overturn the determinations of liability and injury, arguing essentially that NFO lacked standing under *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), that the proof on relevant market was insufficient and that the Court of Appeals had improperly invaded the fact-finding province of the district court. Certiorari was denied. 461 U.S. 938, 939 (1983).

When the case was remanded to the district court for a computation of damages, that court determined that despite this Court's commands in cases such as *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), NFO had not provided any evidence from which any amount of damages could be estimated. *NFO III*, 614 F. Supp. 745 (65a). On appeal, however, the Court of Appeals held: (1) the district court used an inappropriate legal standard—requiring too high a degree of certainty—in rejecting NFO's damage evidence as insufficient; and (2) the evidence adduced by NFO satisfied the legal requirements of *Zenith* and thus provided an acceptable basis for estimating NFO's damages. *NFO IV*, 850 F.2d 1286 (3a). In so holding, the Eighth Circuit pointed out that AMPI had engaged in widespread destruction of relevant evidence, which would entitle the courts to draw adverse inferences on damage measurement and other issues in favor of NFO. *NFO IV*, 850 F.2d at 1307-1308 (46a).

The Court of Appeals concluded:

> "review of the record and our prior opinion establishing the fact of injury leave this court with a definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial. The record simply will not support a finding that NFO was entitled to only nominal damages."

850 F.2d at 1308 (47a). On remand, the Eighth Circuit has instructed the district court to use NFO's "test market" or "yardstick" damage figure as a starting point. That figure may be reduced by certain amounts specified in the Eighth Circuit's opinion. Additional adjustments are to be considered in accordance with guidelines prescribed by the Court of Appeals. 850 F.2d at 1313 (58a).

Petitioners now seek certiorari on grounds which largely parallel the arguments embodied in their certiorari petitions rejected in 1983.

REASONS THE WRITS SHOULD BE DENIED

I. THE "BURDEN OF PROOF" ISSUES ARE ILLUSORY AND UNWORTHY OF CERTIORARI

Recognizing the futility of seeking certiorari merely to review the facts in a particular case, Petitioners seek to transform their case and fact-specific appeal into a legal issue. They argue that the Court of Appeals adopted an incorrect standard of proof in its discussion of the "amount" of NFO's damages. *See* AMPI—Mid-Am Petition at 10-13. More specifically, Petitioners charge that the Court of Appeals somehow misread the landmark decisions in which this Court developed the basic distinction in private antitrust litigation between proving the "fact of injury" and the "amount of damages."

The Court of Appeals held that a private plaintiff who has established that it was injured by an antitrust violation "need only present evidence from which the fact finder may make a just and reasonable estimate" of the amount of damage "that is not based on speculation or guesswork . . . ." 850 F.2d at 1293 (14a). Petitioners do not take issue with this holding; they specifically agree with it, *e.g.*, AMPI—Mid-Am Petition at 9, 11, thereby underscoring the insubstantial—indeed, illusory—character of the "issues presented." [3]

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[3] The cynicism of Petitioners' argument about the inadequacy of NFO's damage proof, in view of what was done to conceal the

Emphasizing that "our prior opinion clearly established the fact of injury to NFO," a holding that Petitioners do not challenge, the Court of Appeals concluded that the district court, on remand, had failed to apply the proper standard of proof for determining the amount of damages. 850 F.2d at 1294 (16a). The settled distinction between the proof requirements applicable to the "fact" of damage and those applicable to the "amount" was spelled out by the Court of Appeals in an entirely orthodox discussion in which the opinion cited to and quoted liberally from this Court's controlling decisions. *Id.* at 1292-93 (12a-15a). At one point, the Court of Appeals noted that the fact of injury "must be established by a preponderance of the evidence," while "a lesser standard of proof is applicable to proof of the *amount* of damage . . . ." *Id.* at 1293 (13a). It is this reference to a "lesser standard of proof" that Petitioners would isolate from the Court's extended discussion and have this Court grant certiorari to review.

The fundamental distinction recognized by the Court of Appeals between the requirements for proving the *fact* of damage and proving the *amount* has one of the longest pedigrees in antitrust law. Beginning with *Story Parch-*

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facts here, is apparent. In an effort to frustrate NFO's pursuit of its claims against Petitioners, documents were burned in "admitted bonfires". *NFO II*, 687 F.2d at 1205 (286a). At the beginning of the case, AMPI ordered the destruction of evidence relating to NFO and antitrust issues, which resulted in the removal and burning of boxes and boxes of documents from AMPI's corporate planning headquarters.

Now Petitioners, seemingly unconcerned about this already-adjudicated obstruction of justice, in effect complain that they were unfairly deprived of the benefit of that evidence destruction. By urging this Court to require NFO to prove the amount of damages with unprecedented precision, in the face of this destruction of evidence that might have aided such proof, Petitioners propose a burden that is neither just nor reasonable. If there is ever going to be a worse case than this for this Court to speak to the issue of burden of proof, we cannot imagine it.

ment in 1931, this Court has repeatedly emphasized that an injured antitrust plaintiff, especially in a market foreclosure case such as this,[4] cannot be required to prove the amount of its damages with the precision that is required of its proof of the fact of injury. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66 (1931). That is the distinction to which the Court of Appeals referred in its observation about a "lesser standard of proof," an observation that Petitioners would elevate to a matter requiring this Court's review.

Other courts have used much the same language as the Court of Appeals to explain the distinction. Thus, in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985), the Fifth Circuit noted that "an antitrust plaintiff must prove [the fact of injury] by a preponderance of the evidence," but "[o]nce the fact of damage has been established, plaintiff enjoys a relaxed burden with respect to the amount . . . ." *See also Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988) ("a lenient burden of proof" in establishing the amount of damages); *Fishman v. Wirtz*, 807 F.2d 520, 550 (7th Cir. 1987) (less "onerous a burden"); *Syufy Enterprises, Inc. v. American Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) ("a less stringent standard of proof"); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) ("lesser

[4] ". . . . Trial and appellate courts alike must also observe the practical limits of the *burden of proof* which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market . . . ." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), emphasis supplied.

quantum of proof" required to prove amount of damages).

Even Justice Powell, in an opinion for four members of this Court (and with which the remainder of the Court did not take issue), has used language very similar to that of the Court of Appeals:

> . . . the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence . . . . Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages . . . .

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 570 (dissenting in part).

If Petitioners' point were well-taken, one would have to conclude that the Antitrust Section of the American Bar Association also has "misread" this Court's decisions. Thus, the Section has characterized the distinction, as did the Court of Appeals, in terms of a lesser burden of proof: ". . . The burden of proving the amount of damages is less than that required for proving the fact of damage . . . ." ABA, ANTITRUST LAW DEVELOPMENTS (SECOND) at 409 (2d ed. 1984). A leading commentator would appear to have fallen into the same error: ". . . once the facts of antitrust injury and of causation have been proven, the plaintiff thereafter has a much lesser burden to establish the monetary extent of that damage . . . ." 10 VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 115.03[2][b] at 115-25 (1988). *See also id.* § 115.03[1][a] ("a lesser burden of proving the quantum of damages").[5]

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[5] Indeed, Petitioners themselves expressly conceded before the Court of Appeals, in language indistinguishable from the Court's, that a "lesser standard of proof [is] applicable to proof of the amount of antitrust damages sustained by NFO," Petition for Rehearing En Banc at 4, and proceeded to elaborate upon the distinc-

Petitioners' suggestion that the Court of Appeals misapprehended the purport of this Court's decisions and the distinction between proof of injury and damage is strikingly rebutted, moreover, by what the Court actually did with the NFO damage claims. For example, NFO had proffered two methods of estimating its damages: the "test market" and the "market structure" approaches, the latter of which produced a considerably higher damage figure. The Court of Appeals, however, while sustaining the "test market" method of proving the amount of damages, held that "the record will not support NFO's proffered damage computations based on the [alternate] market structure theory. . . ." 850 F.2d at 1292, n.3 (11a). Similarly, the Court: (a) rejected NFO's damage claim predicated upon earlier introduction of a "bargaining expense checkoff" because NFO's supporting evidence "simply lacks sufficient information to form the basis of the award NFO claims," *id.* at 1304 (40a); (b) rejected as inadequately supported by record evidence NFO's claim for "post-relief damages," *id.* at 1305 (41a); and (c) remanded to the district court yet other elements of NFO's claim, *id.* at 1303 (37a), 1305-07 (42a-46a).

Thus, it is clear that the Court of Appeals even-handedly adhered to the settled law that, once the fact of injury has been proved by a preponderance of the evidence, an "antitrust plaintiff need only present evidence from which the fact finder may make a just and reason-

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tion, again in language essentially the same as that used by the Court of Appeals:

> . . . while there generally is a more lenient application of the burden of proof to establish the amount of damages caused by antitrust violations, the burden remains nonetheless to establish by a preponderance of the evidence a causal connection between the defendant's wrongful conduct and the damages claimed . . . .

Id. at 20.

able estimate of the damage that is not based on speculation or guesswork . . . ." *Id.* at 1293 (14a).

In yet another effort to manufacture a "burden of proof" issue, Petitioners assert that the Court of Appeals somehow improperly shifted the burden when it suggested" that Petitioners "should have presented evidence of a proper 'yardstick' for measuring the amount of damages in order to remedy NFO's defective damage theory and evidence . . . ." AMPI and Mid-Am Petition at 14. Even putting aside the transformation of a "suggestion" into a "shift" in the burden of proof, Petitioners fail to explain why the matter would justify devoting the limited resources of this Court to its correction. It would be a ticket for this day and train only.

In any event, the Court of Appeals did not place the burden of proof upon Petitioners. To the contrary, as the opinion of the Court of Appeals makes abundantly clear, the Court held unequivocally that NFO's proof had established that Federal Milk Marketing Order 68 was sufficiently comparable to the "damage" markets to serve as a basis for a "just and reasonable" estimate of NFO's damages. *See* 850 F.2d at 1295-97 (19a-24a). Petitioners seize upon the Court's observation that Petitioners had "offered no reasonable substitute yardstick measurement . . . ." *Id.* at 1296 (21a). But this observation, which Petitioners have extracted from the Court's extended discussion of the adequacy of the test market approach, cannot reasonably be read as a "shifting" of the burden of proof. As the context shows, the Court was commenting upon Petitioners' trial strategy of presenting evidence that had nothing to do with the comparability of Order 68, but which purported to show that NFO had suffered no injury at all. *Id.* at 1296-97 (21a-24a).

Petitioners criticize the Court of Appeals, in this connection, for suggesting that Petitioners "had to bear the risk of uncertainty" in NFO's proof of the amount of its damages. AMPI and Mid-Am Petition at 14. Petitioners

have chosen the wrong target. The proposition in question originated with and is firmly embedded in *this* Court's decisions. As the Court noted in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 265:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one . . . .

Accord: *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. at 565; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566-67.

II. THE "EFFECTS OF LAWFUL COMPETITION" ARGUMENT IS INSUBSTANTIAL

Petitioners' argument concerning the "effects of lawful competition" (AMPI and Mid-Am Petition at 15-18) is simply baffling. The Eighth Circuit recognized the settled rule that antitrust damages are not recoverable if the violations did not contribute materially to them, and remanded the case to the district court to determine whether NFO's damage claim should be reduced to account for any losses resulting from Petitioners' lawful competition. 850 F.2d at 1307 (45a).[6] The Eighth Circuit provided the district court with guidelines to be considered as to whether, or to what extent, any such reduction should be made (*id.*), guidelines drawn directly from this Court's teachings in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981), *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

In short, Petitioners are being given the opportunity to litigate on remand the very issue they seek to raise.

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[6] Petitioners carry a significant burden in seeking a damage reduction based on this principle. Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

Nonetheless, Petitioners ask this Court to grant certiorari, rather than allow the lower courts to determine whether any reduction in the NFO claim is appropriate.

Petitioners apparently seek to establish a rule that an antitrust victim must exclude all possible alternative causes of his loss, regardless of the fact that the unlawful conduct was a material cause of the loss, or else the victim is entitled to nothing. In other words, Petitioners would urge that the mere presence of some lawful acts means that a damage claim must be completely rejected. Such a rule would utterly vitiate the Clayton Act's damage remedy and, in any case, was squarely rejected in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. at 114, n.9. *See also Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White J., concurring) ("The plaintiff need not even show that the illegality was a more substantial cause than any other.") *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 805-06 (1st Cir.) *cert. denied*, 379 U.S. 931 (1964). This Court should not grant certiorari for the mere purposes of reaffirming the *Zenith* rule.

III. NFO, AS A DIRECT COMPETITOR OF PETITIONERS, AND A DIRECT TARGET OF THEIR PREDATORY CONSPIRACY, UNQUESTIONABLY HAS STANDING TO SUE

CMPC, joined by its co-Petitioners, has been arguing for 18 years that NFO lacks standing to sue.[7] Not surprisingly, the argument appears again here, in precisely

[7] At every turn, this preposterous argument has been rejected. CMPC raised an identical standing argument in its unsuccessful 1983 Petition seeking review of *NFO II*. Trying to breathe new life into this moribund argument, CMPC disingenuously refers to Associated General Contractors of California v. California State Council of Carpenters (*"AGC"*), 459 U.S. 519 (1983), as an "intervening decision." (CMPC Pet. at 8.) This is more than slightly inaccurate; *AGC* was the principal basis of CMPC's earlier petition, just as it is here.

the same form (CMPC Petition at 12-18), and it clearly deserves the same response.

It is established that Petitioners engaged in a predatory conspiracy to eliminate their competitors and that NFO, one of their most significant competitors, was a principal target because NFO undercut Petitioners' milk prices. Where Petitioners succeeded in eliminating NFO, as in Chicago, they raised prices. 687 F.2d at 1198-99. As held by both the district court and the Court of Appeals, NFO, as a competitor of Petitioners and a direct target of their conspiracy, unquestionably has standing to sue. 687 F.2d at 1209 (293a-294a); 614 F. Supp at 751 (69a). *See* 2 AREEDA & TURNER, ANTITRUST LAW ¶ 340a (1978) ("such standing is so clear it is seldom challenged . . ."); *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co.*, 617 F.2d 1302, 1309 (8th Cir. 1980) ("plaintiff has amply demonstrated standing since it was both a competitor and a potential competitor").

The cases upon which Petitioners' standing argument is based—*Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—confirm NFO's standing to sue.

In *AGC*, a labor union complained that a contractors' association had coerced third parties to utilize non-union contractors, thereby diverting business from certain unionized contractors and, in turn, indirectly disadvantaging the union. Commenting that the plaintiff's alleged injuries were "unspecified," "remote and obviously speculative" and "indirect," 459 U.S. at 539-40, 545 n.52, the Court held that the union lacked standing to sue. The Court emphasized that "the union was neither a consumer nor a competitor in the market in which trade was restrained" (*id.* at 539), and further, that the union was not "a direct victim of the Petitioners' coercive prac-

tices." *Id.* at 540 n.44. The Court also commented that "denying the union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* at 542.

The instant case is completely different. NFO was both a "competitor in the market in which trade was restrained" and "a direct victim of Petitioners' coercive practices." Petitioners are really saying that NFO's injuries were "indirect" because Petitioners injured NFO by depriving it of member-suppliers and of markets. It is difficult to see how conspirators could directly injure their competitor any way *other* than by cutting the competitor off from suppliers and customers. *See, e.g., Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

Confirming the absurdity of Petitioners' position, the Supreme Court in *AGC* held that the persons whose position was identical to NFO's—contractors from whom business had been diverted as a result of illegal coercion —*would* have been entitled to sue. 459 U.S. at 541. Moreover, denying NFO standing to sue would clearly "leave a significant antitrust violation . . . unremedied," allowing Petitioners to go scot free after successfully choking off competition in a basic food commodity. *AGC*, in short, provides no support for CMPC's position.

Citing *Brunswick*, where the Court denied standing to a plaintiff complaining about losses that it claimed to have suffered because of reduced prices resulting from increased competition, Petitioners claim that NFO has not suffered "antitrust injury," *i.e.*, "injury of the type the antitrust laws were designed to prevent." (CMPC Petition at 15.) The instant case, however, is the reverse of *Brunswick*. NFO was injured by Petitioners' conpiracy to *eliminate* competition, including NFO, in order to *raise* prices. This clearly constitutes "antitrust injury." [8]

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[8] The present case thus does not, as Petitioners claim (CMPC Petition at 18), provide an opportunity for this Court to decide the

IV. THE EIGHTH CIRCUIT FULLY ADHERED TO RULE 52(a)

Petitioners argue that the Eighth Circuit violated Rule 52(a), Fed. R. Civ. P., and engaged in *de novo* review in rejecting the district court's finding that NFO presented no evidence sufficient to support a damage award. AMPI and Mid-Am Petition at 18-23. On the contrary, the Eighth Circuit has scrupulously adhered to the requirements of Rule 52(a) throughout this litigation.

In *NFO II*, where the Court of Appeals reversed the district court's liability findings, it explicitly applied the required "clearly erroneous" test, and specifically noted that, "In looking at the evidence underlying the findings, we do not contemplate a *de novo* review." 687 F.2d at 1199 (273a). In *NFO IV*, the Court of Appeals similarly applied the "clearly erroneous" test and, as mandated by this Court,[9] looked at the evidence as a whole:

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issue left open in *AGC*: "Whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market." 459 U.S. at 540-41 n.44. Here, NFO's injury—resulting from Petitioners' conspiracy to eliminate competition in order to raise prices—goes to the very *core* of antitrust policy. Similarly misplaced is the claim (CMPC Petition at 17) based on *Brunswick* and *AGC* that NFO lacks standing because, as an agricultural cooperative, it tries to achieve higher prices for its members. NFO in this case is *not* seeking to use the antitrust laws to promote higher prices through *lessened* competition, as in *Brunswick*. Instead, NFO has invoked the antitrust laws for the reason they were created: to redress injuries caused by Petitioners' unlawful interference with NFO's right to compete.

[9] In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the Court held that "a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

> [T]he district court's . . . finding that NFO offered insufficient proof to recover any damages [is] . . . clearly erroneous
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> * * * *
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> [V]iewed as a whole, the record simply does not support the district court's rejection of NFO's damage evidence in its entirety . . .

NFO IV, 850 F.2d at 1294 (16a), 1303 (37a).

Since the Court of Appeals did purport to apply a straightforward and traditional "clearly erroneous" test, as even Petitioners grudgingly admit, AMPI and Mid-Am Petition at 19, n.10, then what Petitioners are asking for is not the clarification of an important legal issue, but rather that this Court review the record of an eighteen-year-old case that took two years to try and decide whether it concurs in the way the Court of Appeals applied the test to this particular collection of evidence.

There are, in addition, unique circumstances present here which would make the review of this particular case from a Rule 52(a) standpoint of little precedential value. The "findings" to which deference is sought were hundreds of formula "Rejections" of NFO's proposed findings, confessedly devoid of any articulation as to their basis. *NFO I*, 510 F. Supp. at 442, n.28. (419a) These "Rejections" in turn, provided the basis of much of *NFO III*, 614 F. Supp. at 762 (91a), hardly presenting an exemplar of the kinds of findings meriting Rule 52(a) deference.

The presence of any significant Rule 52(a) issue at all is also dubious. The damage evidence was largely composed of statistics compiled by the Federal Government, admissions by Petitioners and undisputed matters of history such as, for example, the fact that NFO, Inc. did achieve a 10.5% market share in the test market. Consequently, the district court's "no damages" holding was simply a general conclusion that, as a matter of law, the evidence, most of its unrebutted, did not provide a reasonable basis for estimating damages.

Moreover, while it reversed the district court, the Court of Appeals did *not* finally resolve all damages-related facts. Instead, even though NFO had been victimized by the widespread destruction of evidence described under Point I, it remanded for further findings on a number of issues, while providing guidance as to the standards that should be applied. This obviously does not reflect *de novo* appellate fact finding. Instead, the Eighth Circuit performed the classic and appropriate appellate functions.

Petitioners' Rule 52(a) argument thus amounts to little more than a quibble over the evidence, a subject completely unsuitable for certiorari review.

V. THE EIGHTH CIRCUIT'S HOLDING THAT ELABORATE RELEVANT MARKET PROOF IS UNNECESSARY FOR PREDATORY HORIZONTAL CONSPIRACIES CREATES NO CIRCUIT CONFLICTS AND RAISES NO IMPORTANT ISSUES FOR REVIEW

In *NFO II*, the Eighth Circuit held that Petitioners had engaged in a predatory horizontal conspiracy to eliminate all competitors in a ten-state region in the Midwest in violation of both § 1 and § 2 of the Sherman Act. The court held that proof of a predatory horizontal conspiracy only requires "a minimal showing . . . as to the product and geographic context of the alleged conspiracy," and that "rigorous" proof of a "relevant market" is not necessary. 687 F.2d at 1193 (260a). According to Petitioners, the failure to require "rigorous" relevant market proof creates a "major conflict among the circuits." (CMPC Petition at 19.)

Of course, the Eighth Circuit *did* require proof of a relevant market. *NFO II*, 687 F.2d at 1193. Thus, the only conceivable issue is whether it required enough proof in the circumstances of this particular case. The benefit of having this Court review the record and embroil itself in the fact-specific issue of whether the Court

of Appeals properly evaluated the relevant market evidence is never explained.

There is, moreover, no conflict among the circuits.[10] Petitioners have simply confused cases arising under the rule of reason with cases involving *per se* illegal conduct. No court has ever required elaborate relevant market proof when faced with the kind of *per se* illegal horizontal predation involved in this case.

A. Petitioners Engaged In Horizontal, Per Se Illegal, Concerted Predatory Practices

The linchpin of Petitioners' entire argument is the repeated but unexplained assertion that Petitioners' conduct constituted a "Rule of Reason conspiracy." (CMPC Petition at 19, 20, 25, 27.) This is nonsense. Petitioners' activities were clearly *per se* illegal. As held in *NFO II*, Petitioners engaged in a horizontal conspiracy using raw predation explicitly intended to eliminate all competition, including NFO, in order to raise prices. The conspiratorial conduct included discriminatory pricing, coercive supply disruptions and bad faith litigation, *NFO II*, 687 F.2d at 1193 (261a-262a), and was found to be "predatory on its face". *Id.* at 1199 (273a).

The characterization of this type of naked, anticompetitive conspiracy as being subject to a "Rule of Reason" defense is remarkable. In fact, the conspiracy found here constituted a classic *per se* Sherman Act violation, drawn straight from the pages of prior unanimous decisions of the Supreme Court. *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966) ("Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (group

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[10] In its first time around seeking certiorari, CMPC argued the very same, "conflict in the circuits" point and got not a single vote. 461 U.S. 938. The argument has not improved with age.

boycott involving discriminatory pricing and concerted refusal to deal is *per se* illegal under both §§ 1 and 2 of the Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188 (1939) (criminal conspiracy—involving, incidentally, one of AMPI's constituent cooperatives—to fix prices and eliminate competition).[11] Petitioners' conduct thus required no rigorous relevant market analysis to asses sits competitive significance. It was inherently and intentionally destructive of competition.

B. No Appellate Court Has Ever Required Rigorous Relevant Market Proof In A § 2 Horizontal Conspiracy Case Involving Concerted Predatory Practices Intended To Destroy Competitors

Stretching to create a circuit conflict, Petitioners ignore the facts in the cases. Every appellate decision cited by Petitioners as requiring rigorous relevant market proof involved ordinary rule of reason-type allegations. Some were garden-variety dealer termination claims. The defendants' conduct in these cases had ambiguous competitive significance unless analyzed in a structural setting.[12] On the other hand, rigorous relevant market

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[11] The Court of Appeals referred to Petitioners' activities as "concerted predatory conduct" without affixing the latin label "per se." However, as the court noted (687 F.2d at 1192 n.16 (260a)), "concerted predatory conduct . . . is 'unreasonable' under Section 1 regardless of whether the *per se* label is attached." For example, in *Klor's*, the classic group boycott case, this Court treated the boycott as *per se* illegal without ever actually using the talismanic phrase, *"per se."*

[12] Petitioners cite (CMPC Petition at 20 and n.19) § 2 conspiracy cases in the Third, Fourth, Fifth, Eleventh and D.C. Circuits as requiring relevant market proof. The holdings in a number of these cases are ambiguous at best, reflecting a commentator's observation that "often . . . the [§ 2] conspiracy allegation appears to be no more than an afterthought . . . and it seldom gets the court's attention." 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Nevertheless, *each* of these cases involved rule of reason-type offenses that would clearly require relevant market proof, even

proof has *never* been required in any case like this one involving horizontal concerted predatory practices revealing on their face a specific intent to destroy all competition and control prices.

This consistent distinction is best expressed in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981):

> [N]o particular level of market power or "dangerous probability of success" has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. [Citations omitted.] But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. [Citations omitted.]

See SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST at 139-40 (1977); 3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358-59 (1978) ("where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable").

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under § 1. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (challenged vertical exclusive dealing contracts were "examined under the rule of reason"); American Football League v. National Football League, 323 F.2d 124, 132 (4th Cir. 1963) (joint venture rule of reason analysis focusing extensively upon defendant's business justifications); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (business tort-type conduct explicitly held subject to rule of reason); Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983) (vertical distribution rule of reason analysis); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (vertical distribution rule of reason analysis).

In *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961),[13] as in all other cases involving horizontal, concerted predation, relevant market proof was held unnecessary because the very nature of defendants' conduct established proof of specific intent to monopolize, the key element in a § 2 conspiracy case:

> [W]here the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent to monopolize.
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> * * * *
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> [T]he defendants took concerted action to drive independent non-cooperative linen suppliers out of business. In our opinion this was sufficient to support the conclusion that Petitioners had the specific intent to monopolize.

Id. at 573. *See, also, United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947) (use of competition-stifling practices that "have been condemned time and again as violations of the [Sherman] Act"; held: no relevant market required); *United States v. National City Lines*, 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (criminal conviction).[14] *Accord*: *United States*

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[13] Petitioners suggest that Karlinsky v. New York Racing Ass'n, 517 F.2d 1010, 1011 (2d Cir. 1975), somehow conflicts with the Second Circuit's earlier *Consolidated Laundries* decision. *Karlinsky*, however, involved no concerted predatory practices as in *Consolidated Laundries* and here, but instead only vague allegations of ambiguous violations, which the court summarily dismissed as frivolous. ("Brevity is dictated by the frivolity of the litigation.") (*Id.*)

[14] Petitioners erroneously suggest (CMPC Petition at 21, n.20) that *National City Lines* was overruled by the Seventh Circuit in Ball Memorial Hospital v. Mutual Hospital Insurance, 784 F.2d 1325 (7th Cir. 1986). However, *National City Lines* was nowhere cited in *Ball Memorial*; more importantly, *Ball Memorial* addressed single firm monopolization and attempted monopolization, *not* a conspiracy to monopolize. CMPC also relies (*id.*) on a district court decision in the Seventh Circuit that purportedly "criticized" *National*

v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956). Here too, as in *Consolidated Laundries*, there was no ambiguity in Petitioners' concerted action; it was taken for the specific purpose of eliminating NFO and *all* competing milk sellers, for the explicit purpose of raising prices. No appellate court confronting such clear malevolent intent, and concerted horizontal predation, has ever required elaborate relevant market proof in a § 2 conspiracy case.

We would note, moreover, that in any event, the evidence of relevant market and Petitioners' power in this case would more than satisfy any requirements for such evidence even in § 2 rule of reason cases. The Eighth Circuit clearly found raw Grade A milk to be the relevant product market and found the geographic target of the conspiracy to be a "ten-state region" of the Midwest (687 F.2d at 1191, 1193) (208a, 261a). The ten states as revealed in the pleadings are: Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas, and Texas. This is the *same* relevant market alleged by Mid-Am in its original and five amended complaints against NFO, thus constituting a conclusive judicial admisison. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 265 (2d ed. 1972); 9 WIGMORE, EVIDENCE § 2589 (Chadbourn rev. 1981). Further, the Eighth Circuit said that Petitioners "do not deny having . . . significant market power" and that "we . . . are pre-

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City Lines. Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231-32 (N.D. Ill. 1976), *rev'd*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). CMPC's citation and discussion of this decision fail to indicate that it was *reversed* by the Seventh Circuit! The Seventh Circuit never dealt with the § 2 conspiracy issues because they were voluntarily withdrawn by the parties. In any event, while suggesting that proof of relevant market should be required where vertical distribution practices are challenged under § 2 of the Sherman Act, the district court recognized that *horizontal* conspiracies did *not* necessitate proof of relevant market. *Id.* at 1232 n.12.

sented with the certainty, on this record, that AMPI, CMPC, and Mid-Am are the major marketers of raw milk produced in the Midwest . . . ." (687 F.2d at 1192.) (259a) The only unresolved question found by the court was the precise level of Petitioners' market shares—a significant issue in § 2 actual, and perhaps attempted, monopolization cases, but irrelevant in § 2 conspiracy cases.

C. The § 2 Relevant Market Requirement Does Not Present An Important Antitrust Issue

As a further reason to deny review, a ruling upon the relevant market question raised by CMPC would be largely unimportant both in this case and in antitrust law generally. As the Eighth Circuit noted, citing *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960), the same predatory conspiracies may violate *both* § 1 and § 2 of the Sherman Act, and here, the Eighth Circuit in fact held Petitioners liable to NFO for violating both, through the same predatory conduct. The law is absolutely clear that horizontal, concerted predatory practices, like those of Petitioners in this case, violate § 1 without necessity to prove relevant market. Thus, even if this Court were to grant the petition and review the § 2 conspiracy finding, Petitioners would *still* be fully liable to NFO under § 1.

Professor Areeda, who devotes less than two pages of his eight volume antitrust treatise to § 2 conspiracies, makes the same point:

> Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint or trade, without the need for consid-

> ering the additional complexities that flow from using the § 2 monopoly concept. *There is therefore no need whatever to try to define the content of the § 2 conspiracy.* [Emphasis added.]

3 AREEDA & TURNER, ANTITRUST LAW ¶ 839 at 358 (1978). Thus, NFO submits that the § 2 conspiracy issue raised by Petitioners simply does not present a significant antitrust issue worthy of this Court's plenary consideration.

CONCLUSION

For all of the above reasons, AMPI's, Mid-Am's and CMPC's Petitions for writ of Certiorari should be denied.

Respectfully submitted,

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